

## Office of the Attorney General

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May 31, 2002

The Honorable K. David Waddell  
Executive Secretary  
Tennessee Regulatory Authority  
460 James Robertson Parkway  
Nashville, Tennessee 37243-0505Re: Proposed Rulemaking Hearing Rules, Chap. 1220-4-2,  
Regulations for Telephone Companies

Dear Mr. Waddell:

My staff and I have reviewed the above-referenced set of rules, which you have submitted to this Office for approval as to legality in accordance with T.C.A. § 4-5-211. These proposed rules concern the provisioning of tariff term plans and special contracts, and establish regular procedures for consideration and approval of such plans and contracts by the Tennessee Regulatory Authority. I am unable to approve the rules in their present form because I believe, for the reasons hereinafter outlined, that proposed rules 1220-4-2-.59(6)(a) and 1220-4-8-.07(3)(a) violate the Public Records Act. In addition, I find that the definitions of "Affiliate" and "Revenue Price-out" contained in proposed rule 1220-4-2-.59(1)(a) & (d) are unclear and should be reworded. Consequently, I am returning the rules to you for appropriate modification by the TRA.

In addition, there are other features of the proposed rules that present serious legal issues, and I would appreciate it if any resubmission of revised special contract rules is accompanied by the Authority's comments on how the proposed rules address these issues. Fundamentally, I am concerned about the absence from the proposed rules of any mechanism to ensure that special contracts and tariff term plans are indeed justified by special conditions and

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do not constitute discriminatory and illegal rates. Moreover, proposed rule 1220-4-2-.59(4) raises concerns because it recognizes termination charges that under some circumstances might constitute penalties for breach of contract. While I have not reached a final decision on these issues at this time, I would appreciate the benefit of the Authority's insights in these regards.

I must reject the rules in their present form because they violate Tennessee's Public Records Act, which is very broad in scope. T.C.A. § 10-7-503 provides that "[a]ll state, county and municipal records . . . shall at all times, during business hours, be open for personal inspection by any citizen of Tennessee, and those in charge of such records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law." The provisions of proposed rules 1220-4-2-.59(6)(a)(2), 1220-4-2-.59(6)(a)(4)(i), and 1220-4-8-.07(3)(a), which would allow customer names and addresses to be redacted or filed under "proprietary seal," conflict with the Public Records Act. Except when it is conducting a contested case hearing and in that context may order information obtained in discovery or offered at the hearing to be filed under seal pursuant to T.C.A. § 4-5-311(a) and T.R.C.P. 26.03, the TRA is required by the Public Records Act to make its records available to the public. Moreover, while there is a federal policy against disclosure of proprietary customer information, *see* 47 U.S.C. § 222(c)(1), that policy yields to other requirements of law and is not implicated by the State requirement that tariff information must be publicly available.

The only exception for the TRA from the Public Records Act derives from T.C.A. § 65-3-109. While this provision now expressly refers to the Department of Transportation, it previously referred to the Public Service Commission and, I believe, continues to apply to the TRA through the general provisions of T.C.A. § 65-4-105(a). Section 65-3-109 provides:

The Department shall not give publicity to any contracts, leases, or engagements obtained by it in its official capacity, if the interests of any company would thereby be injuriously affected, unless, in the judgment of the department, the public interest requires it.

Reading "Department" to mean, in this context, the TRA, this statute does allow the TRA to maintain the confidentiality of contracts when revealing their contents would injure a utility, unless the public interest requires disclosure.

Section 65-3-109 does not, however, allow the TRA by generally applicable rule to decide, in effect, that disclosure of special contracts would injure the companies involved, and further to conclude that the public interest does not override any such injury that may exist. Such a blanket rule would conflict with the spirit of both the Public Records Act and § 65-3-109. Therefore, I am unable to approve the legality of the portions of the proposed rules that would allow the TRA, as a general practice, to place under seal the identity of participants in special contracts. For this reason I am now returning these rules to you for appropriate revisions.

The Honorable K. David Waddell

Re: Regulations for Telephone Companies, Chap. 1220-4-2

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This initial finding also relates to my fundamental concerns about the present and future role of special contracts in utility regulation in Tennessee. Full compliance with the Public Records Act is particularly important in this context because disclosure of the identity of a customer benefitting from a special contract will often be essential to ensure that the favorable terms of such a contract are made available "to any other customer for service of a like kind under substantially like circumstances and conditions," which is the exact language of the proposed rules at 1220-4-2-.59(3) and 1220-4-8-.07(3)(b). As you know, the guiding principle of our statutes is "to secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of undue discrimination." *New York, N.H. & H.R.R. Co. v. I.C.C.*, 200 U.S. 361, 391, 26 S.Ct. 272, 277 (1906). Thus the "filed rate" doctrine is the lynchpin of utility regulation in Tennessee, as it traditionally has been across the country. While our law does recognize "special rates," T.C.A. § 65-5-201, the courts have made clear that "[a] special rate, like the general rate, can only be established under supervision of the Commission **and for reasons obviously stronger.**" *New River Lumber Co. v. Tennessee Railway Co.*, 145 Tenn. 266, 293, 238 S.W. 867 (1921)(emphasis added). The whole thrust of these proposed rules, by making approval of special contracts a routine event occurring on an abbreviated timetable with little opportunity for review by the TRA or the public, and without any specification of the types of reasons that will be deemed to justify departure from the general tariffs, is of great concern to me.

The United States Supreme Court has recently reaffirmed that "[r]egardless of the carrier's motive — whether it seeks to benefit or harm a particular customer — the policy of nondiscriminatory rates is violated when similarly situated customers pay different rates for the same services." *AT&T v. Central Office Telephone, Inc.*, 524 U.S. 214, 223, 118 S.Ct. 1956, 1963 (1998). While the proposed rules recognize this principle, they do not incorporate any mechanism to give it vitality; rather, they appear to erode the traditional protection afforded through specific consideration by the TRA of special contract proposals. It is crucial in considering whether a proposal is discriminatory to follow the three-step inquiry: "(1) whether the services are 'like'; (2) if they are, whether there is a price difference between them; and (3) if there is, whether that difference is reasonable." *Competitive Telecommunications Ass'n v. F.C.C.*, 998 F.2d 1058 (D.C. Cir. 1993). In making this determination, the courts use the "functional equivalency" test developed by the FCC — that is, whether the services are "different in any material functional respect." *American Broadcasting Cos. v. F.C.C.*, 663 F.2d 133 (D.C. Cir. 1980).

Special contracts originally arose when needed services were not available under the general tariffs. They have been approved over the years when carriers have been able to establish that differences in circumstances and conditions justify different rates. *Southern Railway Co. v. Pentecost*, 205 Tenn. 716, 330 S.W. 321 (1959). I am aware that more modern cases recognize that in a competitive environment, negotiations between provider and customer

may produce packages suited to a customer's needs, in which the mix of services and features differs to such an extent that the options are not "like" services. The law "is not concerned with the price differentials between qualitatively different services or service packages." *Competitive Telecommunications Ass'n v. F.C.C.*, 998 F.2d 1058, 1064 (D.C. Cir. 1993). These cases also recognize that the existence of competition, at least in the general sense, may be a factor in determining whether a special rate is permissible.

A useful example of special contract consideration in the modern context is found in the rules of the Federal Communications Commission. Those rules permit contract service arrangements in strictly defined circumstances, depending upon the existence and general level of competition. 47 C.F.R. §§ 69.709; 69.711; 69.713. They require carriers seeking pricing flexibility through contract service arrangements to file a petition establishing carefully specified conditions in the relevant marketplace, and to submit to an elaborate process allowing for interested parties to oppose the petition. The FCC rules delay the effective date of such petitions for three to five months after the close of the pleading cycle. 47 C.F.R. § 1.774. And even though the FCC rules allow for volume and term discounts, *see* 47 C.F.R. § 61.55, they expressly provide that contract services must be made "generally available to all similarly situated customers . . . ." 47 C.F.R. § 69.727(a)(1). Thus while competition has expanded the circumstances in which special contracts may be appropriate, the filed rate doctrine has not been abandoned. The governing Tennessee statutes have not been amended, and the TRA has not deregulated telecommunications services in Tennessee. The presumption is always against a special contract rate and in favor of the general rate.

The TRA has the statutory duty to ensure that special contracts are allowed only when special circumstances justify a departure from the general tariffs. And it must also ensure that any special rate is realistically and in practice made available to all customers who are similarly situated. Active enforcement of the provisions of T.C.A. §§ 65-4-122 and 65-5-204 is essential to prevent the allowance of special contracts from degenerating into a significant and illegal departure from the requirement of uniform rates available to all customers and fixed by published tariffs. While a regime of special contracts might benefit a few customers in the short run, in the long run it would stifle competition and shift the great burden of utility cost recovery to the consumers who are unable to obtain special consideration. Tennessee law does not allow a regime of special rates or discriminatory discounts negotiated by each customer having sufficient bargaining power to command special treatment.

Our law does not specify the precise manner in which the TRA is to examine special contracts, leaving the Authority with considerable discretion in fulfilling its broad mandate. Nevertheless, I am concerned that several features of the proposed rules appear to reduce the level of scrutiny of special contracts and tariff term plans. Initially, the rules contain no standards at all to indicate any of the circumstances in which special arrangements will be deemed appropriate. In contrast to the FCC rules, for instance, these proposed rules give no hint

of the conditions that justify departure from the general tariffs. The proposed rules do place certain restrictions on provisions that may be included in special contracts, but the rules fail to address the conditions of inadequate utility service that would make a special contract appropriate in the first place. Moreover, the proposed rules provide that review by the full TRA is no longer necessary for approval of a special arrangement. Instead, special contracts with non-affiliate customers are "deemed approved" ten days after they are filed, and tariff terms plans are "deemed approved" thirty days after filing. Proposed rule 1220-4-2-.59(7). While the Executive Secretary has power under proposed rule 1220-4-2-.59(8) to intervene before the effective date and suspend implementation of a special contract to allow for further consideration, the very short timetable of these rules would often make such consideration impractical. Taken as a whole, these proposed rules appear to render special contracts not very "special," but routine.

Certainly under these proposed rules the TRA would retain power to review and deny permission for special contract arrangements. But the rules in practice appear significantly to undermine the general tariffs by creating a framework under which special contracts would ordinarily become effective after a very brief time, without close review by the TRA and without conforming to any standards for departure from the general tariffs. I am aware that the TRA customarily requires some evidence of the need for a special contract in each situation it reviews. And I realize that it is not unusual for tariffs to take effect on a relatively brief schedule without specific review by the Authority. But I am concerned that the proposed rules significantly reduce the likelihood of scrutiny for special contracts, without incorporating into the application process any showing of a need for departure from the general tariffs. Moreover, I would be particularly interested in any mechanism to ensure that special rates are, in practice, made readily available to other similarly-situated customers.

I realize that in the modern competitive setting, some of the traditional strictures on tariffing of services appear to be loosening. I am aware that incumbent local exchange carriers need to be able to compete in lucrative markets, so they can afford to provide service at reasonable rates in the rural areas where few competitors desire to venture. I know the TRA has worked diligently both to promote competition and to guarantee universal service. It would greatly assist this Office's review of any rules of this nature if the Authority could lend its insights on why the achievement of these things, under the current statutory framework, requires a multitude of special contract arrangements.

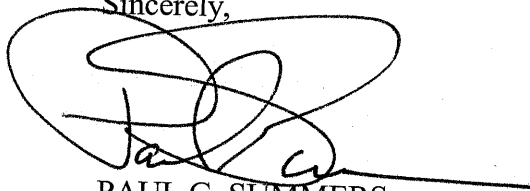
Further, proposed rule 1220-4-2-.59(4) raises concerns because it appears to allow for termination charges that in some instances might amount to impermissible penalties under Tennessee law. In *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88 (Tenn. 1999), the Supreme Court made clear that contractual provisions that are designed to penalize for breach of contract rather than to give the nonbreaching party the benefit of its bargain are unenforceable in Tennessee as against public policy. The proposed rule does not appear to limit termination charges to the actual damages from breach of contract. Rather, it contemplates repayment of discounts, a measure that

may be unrelated to the actual damages the carrier has sustained on account of the breach. Under *Guiliano* the courts consider whether a liquidated sum was a reasonable estimate of potential damages at the time the parties entered into the contract. 995 S.W.2d at 100-01. Proposed rule 1220-4-2-.59(4)(c) caps termination charges at six percent of the special contract amount per year, or 24% of the contract amount for a term plan running longer than four years. This Office has insufficient factual information to determine whether the courts would construe these limits as a reasonable quantification of liquidated damages, rather than an impermissible penalty.

The TRA has very broad authority over the matters within its jurisdiction and, arguably, might establish particularized rules governing liquidated damages upon termination of utility services. But it is unclear whether the proposed limits accomplish this purpose, and, if they do not, whether the TRA has authority to sanction for utilities a practice that has otherwise been characterized by the Supreme Court as against public policy. Certainly, reducing high termination charges that stifle competition is a worthy goal; it is unclear whether the TRA may accomplish that goal through the means outlined in the proposed rules. I would be interested in any information the Authority may have to support the notion of termination charges that amount to repayment of discounts.

In summary, special contracts, in proper circumstances, are permissible, and the TRA has authority to make rules governing their terms. But public knowledge of such special contracts will often be essential in enabling customers to establish that they are similarly situated to another customer benefitting from a special rate. Therefore, the proposed blanket provisions allowing concealment of the names of favored customers are contrary to the proper operation of the Public Records Act, T.C.A. § 10-7-503, and are not saved by T.C.A. § 65-3-109, since they conflict with the TRA's duties to ensure uniform rates and to foster competition among providers of telephone services. Because of this conflict, I am unable to approve the proposed rules as submitted to this Office for review pursuant to T.C.A. § 4-5-211, and I am returning them to you with this letter. Should the TRA decide to resubmit revised rules that eliminate the Public Records violations but include other features of these rules, this Office would appreciate the Authority's comments on its vision for accommodating special contracts within our statutory framework that requires the TRA to ensure that unreasonable preferences in utility rates do not occur.

Sincerely,

A handwritten signature in black ink, appearing to read "Paul G. Summers", is written over a large, loopy circular flourish.

PAUL G. SUMMERS  
Attorney General and Reporter

Rulemaking Hearing Rules  
of the  
Tennessee Regulatory Authority

Chapter 1220-4-2  
Regulations for Telephone Companies

Amendments

1220-4-2-.59 Regulations For The Provisioning Of Tariff Term Plans And Special Contracts

(1) Definitions.

- (a) Affiliate – a person or entity who possesses, either directly or indirectly and either alone or in conjunction with another person or entity, the authority to direct or cause the direction of the management or policies of another entity. Beneficial ownership of more than ten percent (10%) of voting securities or partnership interest in another entity shall be deemed to confer authority for the purposes of these rules.
- (b) Average Annual Revenues – Aggregate revenues billable under a special contract or tariff term plan divided by the term length in years.
- (c) Price Regulation Telecommunications Carrier – For purposes of this rule, an incumbent local exchange carrier as defined in Tenn. Code Ann. § 65-4-101(d) that has implemented a price regulation plan pursuant to Tenn. Code Ann. § 65-5-209
- (d) Revenue Price-out – Quantity for each rate or service element multiplied by the individual unit rate or service element.
- (e) Shortfall Provision – A plan or contract clause requiring the customer to pay the difference between the actual billed revenue and the revenue commitment for a discrete period of time agreed upon by the price regulation telecommunications carrier and the customer.
- (f) Special Contract – A service arrangement that is entered into between the price regulation telecommunications carrier and certain customers prescribing and providing services, rates, terms, practices, or conditions that are not covered by or permitted in the tariffs or price lists filed by such price regulation telecommunications carrier. Special contracts include without limitation all special contract arrangements, contract service arrangements, individual case basis contracts, etc.

- (g) Tariff Term Plan – A service arrangement, including special promotions, offered to customers under the price regulation telecommunications carrier's general tariffs for a service term of three (3) months or longer.
  - (h) Termination Charges – All amounts, including but not limited to amounts resulting from the application of shortfall provisions, charged to the customer by the price regulation telecommunications carrier as a result of the cancellation of service prior to the time that the customer's obligations under a tariff term plan or special contract would have otherwise been satisfied.
- (2) Application. All price regulation telecommunications carriers as defined herein are subject to this rule.
  - (3) Availability. All rates, terms, and conditions of service provided to any customer under a tariff term plan or special contract shall be offered to any other customer for service of a like kind under substantially like circumstances and conditions.
  - (4) Termination Charges.
    - (a) For all tariff term plans entered into after the effective date of this rule by price regulation telecommunications carriers, termination charges shall not exceed repayment of discounts received during the previous twelve (12) months of service, except as specified in subparagraphs (c) and (d) of this paragraph.
    - (b) For any special contracts entered into after the effective date of this rule by price regulation telecommunications carriers, termination charges shall not exceed the total of the repayment of discounts received during the previous twelve (12) months of service, the repayment of the prorated amount of any waived or discounted non-recurring charges, and the repayment of the prorated amount of any documented contract preparation, implementation and tracking charges, except as specified in subparagraphs (c) and (d) of this paragraph.
    - (c) Tariff term plans and special contracts shall not permit termination charges to exceed six percent (6%) of the total tariff term plan or special contract amount. For service terms longer than four (4) years, tariff term plans and special contracts shall not permit total termination charges to exceed twenty-four percent (24%) of the average annual revenues of the tariff term plan or special contract.
    - (d) Termination charges for an individual service may exceed the levels specified in subparagraphs (a), (b) and (c) of this paragraph only upon demonstration to the Authority that the unrecovered portion, if any, of the customer specific costs incurred to provide such service exceeds the levels



in subparagraphs (a), (b) and (c) of this paragraph in the event of early termination. Price regulation telecommunications carriers shall petition for Authority approval of any such charges prior to the effective date of the tariff term plan or special contract.

- (e) Price regulation telecommunications carriers entering into a special contract or tariff term plan with a term of two (2) years or longer shall include as part of the contract signed by the customer a good faith numerical estimate of the total termination charges due from the customer in the event of early termination of service at the end of the first six (6) months of service and at the end of each six (6) month interval of service thereafter.
- (5) Use of Special Contracts and Tariff Term Plans. A price regulation telecommunications carrier shall not use special contracts in lieu of interconnection agreements and or to prescribe or provide for services, rates, terms, practices, or conditions of interconnection or any other carrier-to-carrier service arrangement.
- (6) Filing requirements.
  - (a) Each price regulation telecommunications carrier shall file with the Authority for review and approval a final, signed copy of all special contracts inclusive of attachments and addendums or a written, tariff summary at least ten (10) days before the effective date of such contracts.
    - (1) Whether the price regulation telecommunications carrier files a final, signed copy of the special contract or a tariff summary, the price regulation telecommunications carrier shall also file:
      - (i) Cost justification demonstrating adherence to the price floor as required under Tenn. Code Ann. § 65-5-208(c) and
      - (ii) Revenue price-outs for existing tariff rates, if applicable, and proposed contract rates.
    - (2) Any reference to the customer's name may be redacted unless otherwise ordered by the Authority.
    - (3) Upon application and for good cause shown, the Authority may waive the ten-day time period or any portion thereof.
    - (4) At a minimum, such tariff summaries of special contracts shall specify all material contract provisions and include:

- (i) Customer name and address, which may be filed under proprietary seal unless otherwise ordered by the Authority;
  - (ii) A full and complete description of the services provided or available to the customer;
  - (iii) All individual rates for services provided or otherwise available;
  - (iv) The term of service(s);
  - (v) Volume or quantity of services;
  - (vi) A detailed description of all applicable termination charges. Any request made pursuant to Rule 1220-4-2-.59(4)(d) shall include detailed calculations and supporting documentation;
  - (vii) Term requirements that the customer must fulfill to qualify for the special contract;
  - (viii) Volume or quantity requirements that the customer must satisfy to qualify for the special contract; and
  - (ix) Any and all other particular requirements or conditions that the customer must meet to qualify for the special contract.
- (b) Each price regulation telecommunications carrier shall file with the Authority for review and approval all tariff term plans at least thirty (30) days before the effective date of such plans. Except, upon application and for good cause shown, the Authority may waive the thirty-day time period or any portion thereof. Each tariff term plan filed by a price regulation telecommunications carrier with the Authority shall include tariff language that sets forth at a minimum:
- 1. A full and complete description of the services available to customers;
  - 2. All individual rates for services available;
  - 3. A detailed description of all applicable termination charges. Any request made pursuant to Rule 1220-4-2-.59(4)(d) shall include detailed calculations and supporting documentation;
  - 4. Term requirements that a customer must fulfill to qualify for the tariff term plan;

5. Volume or quantity requirements that a customer must satisfy to qualify for the tariff term plan; and
  6. Any and all other particular requirements or conditions that a customer must meet to qualify for the tariff term plan.
- (7) Approval of Special Contracts and Tariff Term Plans.
- (a) Special contracts with non-affiliate customers shall be deemed approved ten (10) days after the date of the proper filing with the Executive Secretary of the special contract and other information required under Rule 1220-4-2-.59(6)(a) unless otherwise notified by the Authority.
  - (b) Tariff term plans shall be deemed approved thirty (30) days after the filing date of the tariff term plan unless otherwise notified by the Authority.
  - (c) Notwithstanding subparagraph (a) above, special contracts with affiliate customers shall be considered by the Authority at a regularly scheduled Authority Conference, and shall not be effective until explicitly approved by the Authority.
- (8) Powers of the Executive Secretary. If any issue arises as to any special contract or tariff term plan prior to the approval of the special contract or tariff term plan, the Executive Secretary shall have the power to issue a notice to the price regulation telecommunications carrier that filed the special contract or tariff term plan suspending the effective date of the special contract or tariff term plan to allow the Authority sufficient time to consider the special contract or tariff term plan at the next regularly scheduled Authority Conference.
- (9) Amended tariffs. All price regulation telecommunications carriers as defined herein shall file amended tariffs consistent with the provisions of this rule. Such tariffs shall be filed with the Authority to become effective upon the effective date of this rule.
- (10) Powers of the Authority. Nothing in these rules shall limit or otherwise alter the Authority's power to review any special contracts or tariff term plans, either upon complaint or on its own motion, and to take appropriate action as a result of such review. For the purposes of review, the Authority may require carriers to provide, among other information:
- (a) Cost justification demonstrating adherence to the price floor as required under Tenn. Code Ann. § 65-5-208(c) and
  - (b) Revenue price-outs for existing tariff rates, if applicable, and proposed contract rates.

Authority: T.C.A. §§ 65-1-209 and 65-2-102.

Rule 1220-4-8-.07(3) Tariff and Pricing Requirements for Competing Local Telecommunications Service Providers Local Service is deleted in its entirety and amended such that the amended paragraph reads:

(3) Special Contract Provisions

- (a) Each competing local telecommunication service provider shall file with the Authority either a final, signed copy of all special contracts inclusive of attachments and addenda or a written summary of the contract provisions within (30) days after the effective date of such contracts. Any reference to the customer's name may be redacted unless otherwise ordered by the Authority. At a minimum, such written summaries shall include:
  - 1. A complete description of the services provided or available to the customer.
  - 2. The effective date of the contract.
  - 3. The term of the contract.
- (b) All rates, terms, and conditions of service provided to any customer under a special contract shall be offered to any other customer for service of a like kind under substantially like circumstances and conditions.

Authority: T.C.A. §§ 65-2-102, 65-5-201, 65-5-202, 65-5-203, and 65-5-204.

Rule 1220-4-1-.07, Special Contracts, is amended by adding the following language:

Additional regulations regarding special contracts of certain telecommunications carriers operating pursuant to Tenn. Code Ann. § 65-5-209 are specified in Rule 1220-4-2-.59.

Authority: T.C.A. §65-2-102.

Repeals

Subparagraph (g) of Paragraph (2) of Rule 1220-4-2-.55, Regulatory Reform is repealed.

Legal Contact and/or party who will approve final copy for publication:

Richard Collier

Tennessee Regulatory Authority  
460 James Robertson Parkway  
Nashville, TN 37343  
(615) 741-2904

Contact for disk acquisition:  
K. David Waddell  
Tennessee Regulatory Authority  
460 James Robertson Parkway  
Nashville, TN 37343  
(615) 741-2904

Signature of the agency officer or officers directly responsible for proposing and/or drafting these rules:



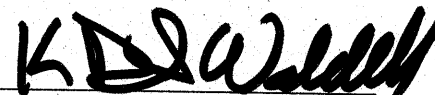
K. David Waddell,  
Executive Secretary

The roll-call vote by the Tennessee Regulatory Authority on these rulemaking hearing rules was as follows:

	Aye	No	Abstain
Sara Kyle, Chairman	<u>X</u>	___	___
Lynn Greer, Director	<u>X</u>	___	___
Melvin Malone, Director	___	<u>X</u>	___

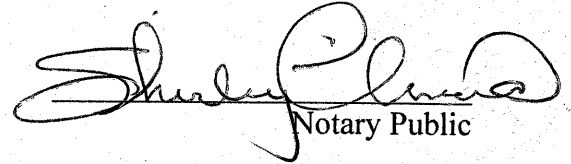
I certify that this is an accurate and complete copy of rulemaking hearing rules, lawfully promulgated and adopted by the Tennessee Regulatory Authority on the 15th day of May, 2001.

Further, I certify that the provisions of T.C.A. §4-5-222 have been fully complied with, that these rules are properly presented for filing, a notice of rulemaking has been filed in the Department of State on the 31st day of August, 2000 and such notice of rulemaking hearing having been published in the September, 2000 issue of the Tennessee Administrative Register, and such rulemaking hearing having been conducted pursuant thereto on the 18th day of October, 2000.



K. David Waddell,  
Executive Secretary

Subscribed and sworn to before me this the 18 day of May, 2001.

  
Notary Public

My commission expires on My Commission Expires MAR 26, 2005

All rulemaking hearing rules provided for herein have been examined by the Attorney General and Reporter of the State of Tennessee and are approved as to legality pursuant to the provisions of the Administrative Procedures Act, Tennessee Code Annotated, Title 4, Chapter 5.

disapproved

Paul G. Summers  
Attorney General and Reporter

The rulemaking hearing rules set out herein were properly filed in the Department of State on the \_\_\_\_\_ day of \_\_\_\_\_, 2001 and will become effective on the \_\_\_\_\_ day of \_\_\_\_\_, 2001.

\_\_\_\_\_  
Riley C. Darnell  
Secretary of State

By: \_\_\_\_\_

**BEFORE THE TENNESSEE REGULATORY AUTHORITY  
NASHVILLE, TENNESSEE**

**May 15, 2001**

**IN RE:        RULEMAKING PROCEEDING - REGULATIONS FOR THE  
              PROVISIONING OF TARIFF TERM PLANS AND SPECIAL  
              CONTRACTS**

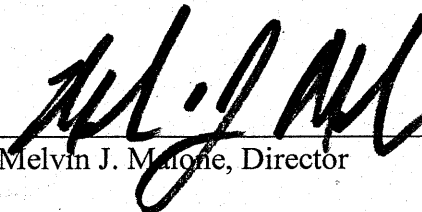
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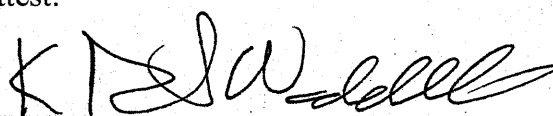
**SEPARATE STATEMENT OF DIRECTOR MELVIN J. MALONE**

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Respectfully, I must vote no on these rules as adopted. Although the agency examined and studied the issues related to these rules for an extended period, the rules adopted today do not, in my opinion, adequately reflect the outcome directed by the information and documentation assimilated. As passed, these rules represent more of the type of regulation that is not competitively neutral and is inconsistent with fostering the development of a competitive environment. Still, I respect the positions of my colleagues. I, however, am not sufficiently persuaded that these rules appropriately balance the interests of the utility consumers and providers and are in the public interest. The die having been cast, given the choice between these rules and no rules, under the circumstances, competition may best be served to have no rules at all.

  
\_\_\_\_\_  
Melvin J. Malone, Director

Attest:

  
\_\_\_\_\_  
K. David Waddell, Executive Secretary